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Office of Administrative Law Judges
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Issue Date: 27 April 2005

CASE NOs. 2004-LHC-0885, 0886, 0887

OWCP NOs. 18-75329, 78882, 79281

In the Matter of:

MICHAEL IVICEVICH,
Claimant,

vs.

EAGLE MARINE SERVICES,
Self-insured Employer.

Appearances:

Charles D. Naylor, Esq.
San Pedro, California
For the Claimant

Daniel F. Valenzuela, Esq.
San Pedro, California
For the Employer and Carrier

BEFORE: ALEXANDER KARST
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case involves three consolidated claims arising under the Longshore and Harbor Workers' Compensation Act as amended, 33 U.S.C. § 901 *et seq.* Claimant Michael Ivcevich, a 54 year old longshoreman, alleges that he sustained four industrial injuries: (1) a discrete traumatic injury to his right scapula and shoulder on February 20, 2001; (2) a cumulative trauma injuries to his back and neck; and (3) a discrete traumatic injury to his left shoulder in the course of surgery to address his cumulative trauma injury to his back.

Respondent Eagle Marine concedes liability for the right scapula injury. The parties have stipulated that the average weekly wage is \$2,705.00 for the cumulative trauma injuries. The primary issues in this case are whether Mr. Ivcevich is entitled to compensation and medical

benefits for the cumulative trauma injuries and the left shoulder injury, the nature and extent of his disability, and whether Eagle Marine is entitled to § 8(f) relief.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. General Background

Mr. Ivicevich became a full-time longshoreman in 1985. TR 30-31. In 1996, he obtained a steady position with Eagle Marine as a sweeper and performed this job between six and seven days per week – from 4:00 a.m. until about 3:00 p.m. TR 31, 49. He explained that he spent the first hour of the day cleaning the employee parking lots with a street sweeper, but he spent most of his day on a 6,000 pound forklift equipped with a scow and a twister. TR 50-51. A scow is a large metal box used to carry garbage that has a four feet by eight feet opening and is about six feet tall, and the twister lifts the scow and turns it upside down to empty the garbage into a large dumpster. TR 51. He also cleaned spills at the terminal by dumping forty pound bags of absorbent sand on the spills and sweeping the contaminated sand into piles and shoveling them into fifty-five gallon drums. TR 67-68. In addition, he shoveled sludge from the truck wash into fifty-five gallon drums. TR 69. The drums from the spills and truck wash were then loaded onto pallets, and taken with the forklift to the hazardous waste disposal area. TR 69. He also used the forklift to deliver office supplies such as boxes of paper to office personnel. TR 70-71.

Mr. Ivicevich estimated that he exited the forklift in excess of three hundred times per day to empty trashcans into the scow and empty the scow into the dumpsters. TR 53. He emptied about 150 trash cans per day, and their weight ranged from “almost empty or ... in excess of a hundred pounds.” TR 54, 61. He also picked up objects that were lying around the terminal, such as truck tires, truck rims, lumber, cardboard, and container chassis parts. TR 61. He testified that he drove the forklift over divots that ranged from “a couple inches to six or eight inches deep” that were caused by container legs compressing the asphalt. TR 62-63. In addition, he drove the forklift over railroad tracks and potholes. TR 64. He described the ride as “trying to ride a hard piece of steel with hard rubber wheels and you’ve got a little cushion of a seat to pad your bum.” TR 65. Further, he explained that forklifts do not have suspension because they are designed to carry heavy loads. TR 65.

Mr. Ivicevich has an extensive history of traumatic injuries that began in 1974, when he fractured his coccyx while working at a shipyard. TR 34-35. In 1987, he injured his left knee. TR 35. In 1989, he was working on a UTR (utility tractor) which was dropped from a height of eight to ten feet, and injured his left shoulder and sprained his back. TR 32. Surgery was performed on the left shoulder in 1990, but he continued to experience problems with it. TR 33. In 1992, he injured his left elbow and two surgeries were performed. TR 35. In 1993, his right arm was crushed under a load of drywall, and several surgeries were required to rebuild his wrist. TR 36. In May 1997, he was treated for tendonitis in his left elbow. TR 38. In October 1997,

¹ The following abbreviations are used throughout this decision: TR = hearing transcript of July 20, 2004; CX = Claimant’s exhibits; EX = Employer’s exhibits; Claimant Brief = Mr. Ivicevich’s Brief; Resp. Brief = Eagle Marine’s Post Trial Brief; Claimant Supp. Brief = Mr. Ivicevich’s Supplemental Post Trial Brief; Resp. Supp. Brief = Eagle Marine’s Supplemental Post Trial Brief; CX 30, = Deposition of Dr. David Morrison; and CX 31, = Deposition of Dr. Curtis Spencer.

he injured his esophagus when he hit his throat against a chassis handle and experienced bruising and pain to the front of his neck and difficulty swallowing. TR 40. He denied that any of these injuries resulted in complications to his neck, back, or shoulders. TR 35-40.

Mr. Ivceovich's treating physicians are Drs. Morrison and Spencer, who share offices. Dr. Morrison has been a board-certified orthopedic surgeon for eighteen years, and his sub-specialty is shoulders and elbows. CX 30, p. 5-6. Dr. Spencer is an orthopedic surgeon who has been in private practice for twenty-four years, and his sub-specialty is spinal injuries. CX 31, pp. 6-7. He estimates that spinal surgery is about seventy percent of his practice, and he performs 400 to 500 spinal surgeries per year. CX 31, p. 7. Dr. James London has examined Mr. Ivceovich as a defense medical expert in connection with the left knee and foot injury in 1989 and the carpal tunnel injury in 1999. TR 130-31, 133-34. Eagle Marine also retained him as its forensic expert in this matter, and he examined Mr. Ivceovich in connection with all the injuries asserted in this claim. Dr. London is an orthopedic surgeon who practices in San Pedro, California, and defense medical examinations have been a regular part of his practice for fifteen to twenty years. TR 130, 164.

Dr. Spencer first treated Mr. Ivceovich in 1990 following the 1989 injury in the UTR and diagnosed a cervical sprain with cervical radiculitis and a rotator cuff strain or sprain with impingement syndrome. CX 31, pp. 8-9. In 1999, he treated Mr. Ivceovich for carpal tunnel syndrome in his left hand, and performed a carpal tunnel release on September 14, 1999. CX 31, p. 14. Mr. Ivceovich returned to his regular duties as a sweeper, and he did not recall any pain in his neck or lower back when he returned to work after the surgery on his wrist. TR 42-43.

On September 28, 2000, Mr. Ivceovich reported to Dr. Spencer that he had injured his low back and hip area when he ran over a bump in his forklift. CX 31, p. 20-21. Dr. Spencer ordered X-rays, which revealed mild degenerative changes at the L-3 and L-4 level and spondylolisthesis at the L-2 and L-3 level. CX 31, p. 21-22. He concluded that Mr. Ivceovich had back spasms, ordered him to stay off work for one week, and prescribed pain medication and a six-day steroid pack for inflammation. CX 31, p. 23.

Dr. Morrison first performed surgery on Mr. Ivceovich in 1994, when he repaired his left rotator cuff and performed a subacromial decompression. CX 30, p. 7. Mr. Ivceovich testified that his left shoulder felt "much better" after the rotator cuff repair in 1994. TR 33-34. Between 1994 and 2002, he continued to experience occasional stiffness and soreness in his left shoulder when he performed his duties as a sweeper, but the pain was not debilitating. TR 34. His treatment during this time consisted of anti-inflammatory medication and injections. TR 34.

A. Right Scapula Injury

On February 20, 2001, Mr. Ivceovich slipped on water and grease and hit his right shoulder blade against his forklift's fender. TR 45. He went to the emergency room at San Pedro Hospital, where X-rays revealed that he had shattered his right scapula. TR 45. He was referred to Dr. Morrison, who prescribed medication, and ordered that Mr. Ivceovich not work for about four months. TR 46.

Mr. Ivicevich testified that he continues to have problems when he overuses his right shoulder, for which he is prescribed muscle relaxants and anti-inflammatory and pain medications. TR 47, 116. Dr. Morrison testified that he expects Mr. Ivicevich to have continuing problems with weakness in the shoulder, spasms in his parascapular muscles and neck muscles, and tendonitis of the subscapularis muscle. CX 30, p. 35. In addition, he says that he will probably require three to five sessions of physical therapy two or three times per year when his shoulder flares up, cortisone injections, and muscle relaxants on an intermittent basis. CX 30, pp. 35-36. He returned to his regular job duties as a sweeper on June 23, 2001, and Eagle Marine paid temporary total disability for this injury from February 21, 2001 through June 22, 2001. On November 18, 2002, Dr. London pronounced the right scapula permanent and stationary and noted that further medical treatment was not required, and he reiterated that opinion on April 24, 2004. EX 4, at 29; EX 9, at 43.

B. Cumulative Trauma Injury to Back and Neck

Mr. Ivicevich testified that after he returned to work from the scapula injury, the pneumatic tires on the forklift were replaced with solid rubber tires. TR 74. He claimed that the new tires made the ride a lot stiffer, and made going over bumps and railroad tracks a lot more jarring. TR 75. He characterized the impact that he experienced driving over this terrain as “light [jarring impact] all the time. Strong [jarring impact] ... every day, every day at least.” TR 70. He claims that he asked management “repeatedly, if not daily” to put the pneumatic tires back on the forklift, but they failed to do so. TR 75-76. He claimed that the only alteration that was made to the forklift was the addition of an ergonomic seat. TR 76. Finally, Mr. Ivicevich wrote a letter to Eagle Marine’s management to request pneumatic tires on the forklift. TR 76; CX 25 at 980.

Mr. Ivicevich testified that he experienced soreness in his back and neck on a daily basis. TR 77. Eventually, the pain persisted through the night and he was unable to sleep. TR 77. He tried to ease the pain by using ice packs and heat packs and being cautious at work. TR 77. In July 2002, he claimed that his pain was so severe that he could not turn his head to the left and “[e]very little vibration of the forklift would resonate in my neck. I felt like somebody put a vise grip on my hip and on my – on my upper right leg. Just extreme, extreme deep pain in my hip and my right leg.” TR 77-78. Further, he testified that he occasionally had extreme back pain, but he was most concerned with the pain in his hip and leg at that time. TR 78. In July 2002, Mr. Ivicevich took two weeks off work to “see if my body would heal.” TR 77. He testified that he reported his neck, hip, leg, and back pain to Dr. Morrison, whom he was seeing for the scapula injury. TR 78. On August 15, 2002, Dr. Morrison noted the spinal problem and recommended that Mr. Ivicevich see a spinal specialist, whereupon he saw Dr. Spencer in the same office. CX 21, at 779.

On September 12, 2002, Dr. Spencer took X-rays, performed an MRI, and prescribed oral steroids. CX 31, p. 26. According to Dr. Spencer, Mr. Ivicevich said that he had been having problems with his neck during the previous six to twelve months, with increased pain in the previous month when he drove his forklift over potholes. CX 31, p. 26. He also complained of lower back pain that radiated into his right thigh and that the neck pain radiated into his left shoulder, thumb, and index finger. *Id.* at pp. 26, 28. Dr. Spencer was concerned about the pain

radiating into the thigh because it could be attributed to a compressed nerve root as a result of the spondylolisthesis. CX 31, p. 29. He was also concerned that the numbness and tingling in the thumb and index finger was the result of pressure on one of his cervical spine nerves. CX 31, p. 29. According to Dr. Spencer, Mr. Ivceovich attributed his symptoms to riding over rough terrain in his forklift, and he concluded that Mr. Ivceovich had sustained a repetitive trauma injury to his back and neck. CX 31, pp. 29, 42. Dr. Spencer diagnosed Mr. Ivceovich as having lytic spondylolisthesis, degenerative disk disease, and spinal stenosis. CX 31, p. 32.

From October 2002 through January 2003, Mr. Ivceovich received epidural injections and used oral steroids. TR 85-86. He claimed that the pain in his hip and leg was tolerable, but he continued to experience back pain which prevented him from being able to walk or bend over without discomfort. TR 86. He testified that the conservative treatment alleviated his pain, but he became concerned about weakness in his legs and shortness of breath from walking up a flight of stairs as a result of inactivity that was attendant to his treatment. TR 86-87, 91-92. He testified that the pain “went from maybe a 9 or 10 down to a 6, but I was left with legs that were very weak.” TR 91. He expressed his concerns to Dr. Spencer, who told him to try to “swim and try to stay in shape the best he can.” CX 31, p. 54. Accordingly, Ivceovich tried to go surfing in December 2002 on one to two foot waves, but his legs “just collapsed” when he attempted to stand up. TR 88, 195. Dr. Spencer opined that this incident did not cause any further harm or injury to his back or neck. CX 31, p. 54.

On November 18, 2002, Dr. London examined Mr. Ivceovich’s cervical spine and neck, upper extremities, upper back, and lower back. TR 135. The doctor recalled that Mr. Ivceovich had told him that the back pain was the result of the solid tires on the forklift, but denied that Mr. Ivceovich mentioned any injurious stimuli other than bouncing around in the forklift as a result of the new tires. TR 138. Dr. London opined that restrictions against heavy lifting or carrying and repeated bending, or prolonged work with his neck in an extended position were appropriate for Mr. Ivceovich. TR 139. Dr. London did not find Mr. Ivceovich permanent and stationary in relation to the neck and back injury on November 18, 2002 because he was still pursuing treatment for this injury. TR 139. He noted that Mr. Ivceovich had give-way weakness, variable range of motion loss, and non-dermatomal numbness. He felt that these “findings cannot be explained on any objective orthopedic basis.” EX 4, at 30. He explained that give-way weakness indicates that an individual is not giving a good faith effort during an examination because they initially provide resistance and cave in, whereas an individual with *bona fide* weakness “will have reduced strength, but it’s consistently reduced.” TR 140. He explained that “[v]ariable range of motion loss is on – say I can move my wrist down this far and up this far. I would anticipate that if I went to then measure that, it would – again, it would be the same numbers. When the numbers keep changing, then it’s a variable range of motion loss.” TR 140. Finally, he explained that numbness in one’s lower extremities tends to follow predictable patterns based on the dermatome that is the source of the injury, but non-dermatomal numbness describes “diffuse numbness that crosses over several dermatomes ... that’s very difficult to explain on an objective basis.” TR 140-41. Dr. London opined that these findings are important because they indicate that an individual may not be giving his best effort. TR 141.

On January 28, 2003, Dr. Spencer characterized the low back degeneration as “severe” and the spinal stenosis as “moderately severe.” CX 21, at 696. Dr. Spencer opined that Mr.

Ivicevich had degeneration in his spine before he began working for Eagle Marine in 1996, but his work as a sweeper – such as driving a forklift over rough terrain – contributed to his back condition, especially in light of his pre-existing spondylolisthesis and degenerative disk disease. CX 31, p. 36, 39, 50-51. Further, he testified that “statistically we know that people who work on vibratory equipment have a higher instance of back injury and back degeneration.” CX 31, p. 36. He explained that “vibratory equipment” includes jackhammers and forklifts. *Id.* He believes that Mr. Ivicevich’s work activities accelerated the degenerative process in his back and neck, and stated that Mr. Ivicevich “will always have intermittent back pain” and will eventually need to have surgery on his neck because his spinal stenosis will continue to progress. CX 31, p. 40-41, 45-46, 50-51.

On February 25, 2003, Dr. London performed a diagnostic study review and looked at films from Mr. Ivicevich’s medical files. EX 4. He compared X-rays of the cervical spine that were taken on September 12, 2002 and October 22, 1998, and concluded that the spine had not changed between these two dates. EX 3, at 15. Dr. London also reviewed an X-ray of the lumbar spine from September 24, 2002 that revealed lumbar scoliosis, spondylosis, disc space narrowing at L2 and L3, and disc bulges L2, L3, and L4 with disc space narrowing, arthritis at L3 and L4 and slight narrowing of the spinal canal at L3 and L4. Dr. London testified that he was concerned that Mr. Ivicevich had claimed that he had not had a prior neck injury, but X-rays of his spine were taken in 1990 and 1998. TR 143. As a result, Dr. London requested the medical records that corresponded to the earlier X-rays and concluded that although Mr. Ivicevich had “exacerbated [his back] conditions as a result of working on the forklift, he did not ... permanently worsen or aggravate those conditions.” EX 4, at 15.

Dr. London agrees with Dr. Spencer’s diagnosis of spondylosis, degenerative disc disease, and multilevel lumbar spine stenosis. However, he believes that this condition was not aggravated by Mr. Ivicevich’s work as a sweeper because he had pre-existing spondylosis that was aggravated in 1991 and resulted in an eight percent impairment to his entire body, and he has pre-existing X-ray evidence of cervical disc disease, lumbar disk disease, facet joint arthritis, and bone spur formation in both the cervical and lumbar areas of his spine. TR 158, 160, 188-89. Further, he also had a pre-existing eight percent impairment to his lower left extremity as a result of the 1987 injury to his left knee. TR 160.

Dr. London has consistently reported that Mr. Ivicevich has calluses and heavy staining on both hands. EX 2, at 11; EX 3, at 15; and EX 4, at 30. He noted these features because he felt they were inconsistent with Mr. Ivicevich’s claim that he is unable to work and experiences debilitating pain. TR 145. He recalled observing a set of calluses on both hands and concluded that “you can’t get that unless you’re using your hands forcefully.” TR 145. In March 2003, Dr. London concluded that Mr. Ivicevich had pre-existing cervical lumbar disc disease and facet joint arthritis in the cervical lumbar spine and that his condition was not aggravated by his work activities as a sweeper. Dr. London reached this conclusion as a result of the X-rays that were taken prior to the claimed injuries and revealed no objective changes, Mr. Ivicevich’s symptoms, and “his ongoing ability to use his upper extremities in some forceful fashion,” as evidenced by the calluses. TR 147.

On March 25, 2003, Mr. Ivceovich reported to Dr. Spencer that his low back “was bothering him a little bit more.” CX 21, at 736. He decided to undergo surgery because he was concerned about the impact his injury was having on his lifestyle. TR 92. He claimed that he had gone from working full time and surfing during his free time to doing nothing. TR 87. In an undated note, Dr. Spencer recommended a lumbar laminectomy, spinal fusion, and internal fixation because Mr. Ivceovich continued to have sensations of his right leg giving way and his symptoms had “progressed to the point where he is really not tolerating them.” CX 21 at 690. Dr. Spencer performed the surgery on May 30, 2003, and he said that he performs about 250 similar procedures each year. CX 31, at p. 7. He testified that the purpose of the surgery was to take pressure off the spinal sack, alleviate the leg pain, and stabilize the spine at the L2-L3 level. CX 31, pp. 33-34. Mr. Ivceovich testified that he continues to experience “deep pain” in his hip and leg as a result of everyday activities such as walking up inclines, and he continues to do yard work at his house, which includes pulling weeds from flower pots and using a weed sprayer. TR 89. However, he claims that before his injury, he used to do much more strenuous activities around his house such as shoveling and lifting heavy objects. TR 91. Dr. Spencer testified that Mr. Ivceovich could repeatedly bend over and squat if he was not lifting heavy loads. CX 31, p. 56.

After the surgery, Mr. Ivceovich received pain management for his back with Dr. Lanman until December 2003. TR 94. During this time, he took pain medications such as Oxycontin, which he claimed controlled his pain. TR 95. The treatment of the left shoulder interrupted the physical therapy on his back. TR 98. In addition, Mr. Ivceovich continued to experience severe pain in his neck, and he received injections to address the pain. TR 97-98. On December 3, 2003, Dr. Spencer noted that “his neck is a significant problem” and he sought authorization for cervical discograms. CX 21, at 744. On January 29, 2004, Dr. Spencer noted that the discograms revealed “quite severe” pain at C3-4. CX 21 at 740. He concluded that Mr. Ivceovich will probably require a multi-level fusion at some stage if he “was unable to ... perform repetitive motion or prolonged sitting.” CX 21 at 740. Mr. Ivceovich testified that the pain was chronic, affected his ability to sleep and drive, and was very pronounced when he would turn his head to the left. TR 98. He said that he continues to have constant pain down the center of his neck and claims that moving his neck from side to side or looking up exacerbates the pain. TR 119-20. In addition, when he forgets to move his neck, he experiences problems with stiffness. TR 120. He claims that he experiences a burning pain in his back when he has to remain seated, and it is more severe when he drives certain vehicles but he has fewer problems when he is able to stand and move around. TR 121.

C. Left Shoulder Injury

Mr. Ivceovich testified that when he woke up after the spinal surgery by Dr. Spencer, he felt severe pain in his left shoulder. TR 93. He claimed that he facetiously asked the hospital staff, “if they dropped me on my left shoulder during surgery.” TR 93. The pain persisted during his stay in the hospital after the surgery, but he did not pay much attention to it because he was more concerned with trying to recover from his back surgery. TR 93. He testified that he experienced shoulder pain when he was getting in and out of bed and chairs and even when he was getting dressed. TR 95-96. He also experienced difficulty performing some of the physical therapy exercises that involved use of his left shoulder. TR 96. Mr. Ivceovich testified that he

told his physical therapist and Dr. Spencer about the pain in his left shoulder. TR 96. However, Dr. Spencer's notes do not document any shoulder complaints until September 29, 2003, some four months after the surgery. CX 21 at 749. Mr. Ivceovich explained that prior to that date Dr. Spencer was most likely unaware "that this was not something I was telling him just casually in passing." TR 96.

According to Dr. Morrison, Mr. Ivceovich complained that he had left shoulder pain, was unable to sleep comfortably, could not use his arm above chest level, and experienced pain and fatigue when he drove a car. CX 30, p. 37. Dr. Morrison recalled that Mr. Ivceovich claimed to have noticed the pain shortly after surgery. CX 30, p. 9. Dr. Morrison performed an MRI, which revealed a rotator cuff tear "that appeared to be in an area different from the patient's [1994] surgery." CX 30, p. 11. Dr. Morrison testified that when he performed the second operation, the tear that he repaired "was consistent with either an extension of the original injury or a new injury." CX 30, p. 12. Dr. Morrison testified that Mr. Ivceovich's shoulder symptoms could increase as a result of the rehabilitation exercises and altered body mechanics after the surgery. CX 30, p. 17. He explained that shoulder problems are not uncommon in patients after major surgery "[b]ecause of the use of the arms to assist in the movement of the body more so than they normally would." CX 30, p. 18.

On April 21, 2004, Mr. Ivceovich was again examined by Dr. London and reported that he had noticed severe pain in his left shoulder following the back surgery. TR 148; RX 9, at 40. Dr. London concurred with Dr. Morrison's post-operative diagnosis of impingement syndrome and clinoheomoral degenerative arthritis was inconsistent with an injury sustained as a result of having one's arm pulled. TR 150. However, he also opined that a torn rotator cuff was not a medically probable result of his arm being pulled, but it was possible if Mr. Ivceovich had been dragged after the surgery by his arm. TR 151. Likewise, Dr. Spencer opined that the injury was possible as a result of the surgery, but "highly unlikely." CX 31, p. 72. Dr. London testified that the more likely cause of the conditions listed in Dr. Morrison's diagnosis were repetitive use of the arm in activities such as throwing, pushing, and lifting. TR 150. He explained that Mr. Ivceovich had had a prior tear of his rotator cuff and had also previously had surgery to repair it, and thirty percent of individuals who have had a torn rotator cuff repaired have a recurrent tear. TR 151-52. Dr. London testified that he would expect symptoms from a rotator cuff tear resulting from a sudden trauma to manifest themselves immediately following the trauma that caused it because the "condition is painful and alters the function of the shoulder suddenly," whereas a rotator cuff tear that develops as a result of impingement develops gradually. TR 153. Dr. London testified that he has observed shoulder injuries that have resulted from the positioning of the arms during surgery, and he would expect the patient to complain about the shoulder pain within forty-eight hours because of the anesthetic and pain medication, but he nevertheless considered a rotator cuff tear to be "very improbable." TR 155. Likewise, Dr. Spencer testified that Mr. Ivceovich "didn't complain of anything in his shoulder right after the surgery. So normally if somebody tears a rotator cuff during a hospitalization they start to complain of shoulder pain immediately." CX 31, p. 72.

On December 17, 2003, Dr. Morrison performed a rotator cuff repair, subacromial decompression, and removed any bone spurs that may have damaged the rotator cuff. CX 30, p. 19; CX 12 at 107. During surgery, he found that Mr. Ivceovich had an eighty-five percent partial

tear of his supinator muscle and degenerative arthritis. CX 30, p. 19. Dr. Morrison testified that the arthritis would cause the shoulder to become more painful when it is frequently used for weight bearing activities such as getting out of bed and in and out of chairs. CX 30, p. 19-20. He also experiences pain when he uses his left arm at or above chest level and claims that he has a loss of motion. TR 117-18.

II. TEMPORARY TOTAL DISABILITY

The Act defines “injury” as an accidental injury “arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury.” 933 U.S.C. § 902(2). The term “injury” includes the aggravation of a pre-existing, non-work-related condition or the combination of work- and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295, 297 (1990). In addition, the employer is liable for the resulting sequelae of a work-related injury. *Sequero v. Universal Maritime Service*, 36 BRBS 28, 34 (2002). Further, the Act provides that “in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary – (a) that the claim comes within the provisions of the Act.” 33 U.S.C. § 920(a). To invoke the § 20(a) presumption, the claimant must show that he sustained an injury, *i.e.* physical harm, and that an accident occurred or working conditions existed that could have caused the harm. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *decision on remand*, 17 BRBS 10 (1984), *aff’d*, 799 F.2d 1308 (9th Cir. 1986). Here, I find that Mr. Ivceovich has shown through the medical records and testimony of Drs. Morrison and Spencer that he sustained physical harm. He has also shown that working conditions existed that could have caused this harm – he spent most of his work hours driving a forklift with no suspension over rough terrain and repeatedly lifting heavy objects. Accordingly, he is entitled to the § 20(a) presumption, and therefore, the burden shifts to the employer to rebut the presumption with substantial evidence that the injury was not caused or aggravated by the claimant’s employment. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6, 8 (1998). The employer may overcome the presumption “only ‘by evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment. *Ramey v. Stevedoring Services of America*, 134 F.3d 954 (9th Cir. 1998)(*quoting Parsons Corp. v. Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980)). Once the employer has rebutted the presumption, it no longer controls, and the case is decided on the evidence of record as a whole – with the claimant bearing the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). “If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury.” *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454, 457 (9th Cir. 1954).

Mr. Ivceovich argues that his work-related cumulative trauma injuries to his neck and back were caused by his work activities at Eagle Marine. In addition, he contends that the injury to his left shoulder is the sequelae of the back injury. Accordingly, he seeks TTD from September 27, 2002 through June 20, 2004. Eagle Marine argues that Mr. Ivceovich’s inconsistent explanations of his injuries and Dr. London’s testimony sever the causal connection between Mr. Ivceovich’s injuries and his employment with Eagle Marine. In the alternative, Eagle Marine contends that the left shoulder injury is not work-related and Mr. Ivceovich is

entitled to TTD only until December 3, 2003 because he could have returned to work as a marine clerk on this date absent the injury to his shoulder.

Dr. Spencer and Dr. London agree that Mr. Ivicovich has spondylosis, degenerative disc disease, and multilevel lumbar spine stenosis and that Mr. Ivicovich had degeneration in his spine before he began working for Eagle Marine in 1996. TR 188-89. However, Dr. Spencer and Dr. London disagree about whether Mr. Ivicovich's employment as a sweeper aggravated his back and neck conditions. Mr. Ivicovich testified that he experienced symptoms in his neck and back after he returned to work in June 2001, and he reported these symptoms to Dr. Morrison – who was his treating physician for the right scapular injury. However, Dr. Morrison's records do not contain any mention of the problem until August 15, 2002. Mr. Ivicovich opined that this happened because he has extensive medical files and his appointments and examinations concentrate on the particular body part for which he is being treated – *i.e.* scapula. TR 78-79. In addition, Mr. Ivicovich claimed that the new forklift had to be exited in a different manner and that this change caused him to experience soreness in his neck and back when he woke up to go to work the next morning. TR 74-75. I note that Dr. Spencer did not mention this additional theory. In addition, I note that Mr. Ivicovich testified that he experienced strong jarring impact on the forklift “every day,” but when he was asked if he experienced such impact “frequently,” he responded “Frequently throughout the day. Yeah. Talking about, you know, real bad jars, oh, man, that was terrible, yeah several times a day.” TR 70. Mr. Ivicovich's testimony struck me as somewhat practiced. In addition, his testimony that in January 2003 he could not bend over without pain is undercut by Eagle Marine's sub rosa films showing him bending over repeatedly on January 8, 2003 – sometimes for two minutes at a time. *Compare* TR 86, 88 to EX 13. When questioned about this film, Mr. Ivicovich said that “at one period of time, bending was something that I could do.” TR 89-90. On balance, this evidence leads me to conclude that Mr. Ivicovich's testimony was not credible.

Nevertheless, I have no reason to question Mr. Ivicovich's description of his work activities as a sweeper. In addition, his contention that the new tires on the forklift were causing the problems is documented by a letter to Eagle Marine that requested pneumatic tires on January 10, 2002. CX 25, at 980. Accordingly, the fact that complaints about his back do not appear in Dr. Morrison's notes until August 2002 is not dispositive. Dr. Spencer believes that Mr. Ivicovich's spinal condition was aggravated by his job as a sweeper and stated that people who work on equipment that vibrates such as forklifts and jack hammers “have a higher instance of back injury and back degeneration.” CX 31, p. 36.

Although Dr. London concluded that Mr. Ivicovich should be restricted from heavy lifting and repetitive bending, EX 4 at 30, he believes that Mr. Ivicovich's employment did not aggravate his pre-existing spinal condition. He concluded that Mr. Ivicovich merely “exacerbated” his spinal condition by working on the forklift and explained that exacerbation denotes “a transient increase in the symptoms,” and compared it to having “a sore thumb from hitting it with a hammer, it'll hurt more if you press with your thumb, but you haven't made the injury worse.” TR 144. Dr. London testified that X-rays of the spine from 1998 and 2002 did not reveal any changes. On cross-examination, however, he admitted that a person could have a change in symptoms that would not show up on X-rays. TR 173. Further, he conceded that a person with spondylosis or degenerative disc disease is more susceptible to a back injury and is

subject to aggravation from bending, twisting, lifting, and axial loading of the spine from bumping and jarring. TR 189-91. He also agreed that the disc degeneration that Mr. Ivicovich has in his neck is subject to aggravation from repetitive bending and twisting and possibly lifting. TR 192. While both Dr. London and Dr. Spencer's expert views on the effects of his work are persuasive, I find Dr. Spencer's testimony on this point more persuasive, and therefore hold that Mr. Ivicovich's spinal condition was aggravated by his employment as a sweeper.

Eagle Marine submits that Mr. Ivicovich could have returned to work as a marine clerk following his back surgery as early as December 3, 2003. Mr. Ivicovich contends that his left shoulder injury precluded him from returning to work in any capacity until June 21, 2004, and he is entitled to TTD through that date because the left shoulder injury was the sequelae of his work-related back and neck injury. Eagle Marine argues that the left shoulder injury did not occur during his back injury.

Dr. London, Dr. Morrison, and Dr. Spencer all testified that a rotator cuff tear is possible as a result of positioning during surgery, but they agreed that such an injury is unlikely. Dr. Morrison acknowledged that although Mr. Ivicovich's injury was consistent with his positioning during surgery, the positioning during surgery was not "necessarily his etiology." CX 30, p. 40. Moreover, he testified that "[i]f the patient had no pain in his shoulder for three months following the surgery, then it would not be related to surgical positioning" CX 30, p. 41. This testimony echoed the conclusions of Drs. London and Spencer, who also stated that a rotator cuff tear resulting from a traumatic episode would cause debilitating pain.

Dr. Morrison estimated that he sees approximately seven to ten patients per year who develop shoulder symptoms after back surgery is performed. CX 30, p. 13-14. He opined that the shoulder injuries are caused in three different ways: (1) positioning during surgery that causes lack of oxygen to the tendon that leads to tendonitis after surgery, (2) the use of depolarizing muscle relaxants during surgery that can cause muscle spasms and injuries to the rotator cuff, and (3) exercises performed during postoperative rehabilitation that irritate the rotator cuff. CX 30, pp. 14-15. He explained that rotator cuff tears are caused by either an acute traumatic episode or they are preceded by tendonitis that causes the tendon to weaken, degenerate, and tear. CX 30, p. 15. Dr. Morrison testified that Mr. Ivicovich was referred to him for the left shoulder condition because he noticed pain in the shoulder when he began physical therapy after the spinal surgery and the left shoulder pain interfered with the therapy. CX 30, p. 9. However, he also testified that around October 30, 2003 he was of the impression that the left shoulder symptoms began immediately after his spinal surgery. CX 30, p. 43. He explained that he would not have discussed the surgery as a possible cause of the left shoulder problems unless he believed that the symptoms arose immediately after the surgery, but he could not recall whether he assumed that that was the timing from his discussions with Mr. Ivicovich or whether Mr. Ivicovich had explicitly told him. CX 30, p. 43. Dr. London concluded that the left rotator cuff tear did not arise out of and in the course of Mr. Ivicovich's employment with Eagle Marine. EX 9, at 43-44.

Dr. Morrison apparently does not have a clear recollection of why he concluded that Mr. Ivicovich woke up from surgery with severe shoulder pain, but his conclusion that the surgery was a possible cause echoes Mr. Ivicovich's testimony. Clearly, Mr. Ivicovich attended physical

therapy for several weeks following his back surgery. In addition, on August 7, 2003, Dr. Spencer noted that that Mr. Ivceovich was swimming. CX 21, at 752. Mr. Ivceovich's ability to use his shoulder while swimming is inconsistent with the testimony from Dr. London, Dr. Morrison, and Dr. Spencer that a rotator cuff tear caused by discrete trauma immediately results in severe pain. Further, Dr. London has routinely noted in his reports that Mr. Ivceovich's hands are callused and stained, and he concluded that this indicates that he engages in activities that contradict his subjective complaints of pain. TR 147. He denied that he told Dr. London that he had stains on his hands from working in a wood shop in his house; instead, he testified that he has hobbies that include refinishing ceramic figurines and picture frames, "basically sanding and staining." TR 127. I found Dr. London credible, and note that he has no incentive to fabricate Mr. Ivceovich's remarks about the woodshop. On balance, I also credit Dr. London's view that Mr. Ivceovich engaged in conduct that impeded his recovery. See 1 LARSON'S WORKER'S COMPENSATION LAW § 10.10[1]. Accordingly, I find that his injury to his left shoulder was not the unavoidable result or natural progression of his back injury or the sequelae of the surgery.

Nevertheless, Mr. Ivceovich is unable to return to his usual and customary employment as a result of his injuries to his back and neck. Thus, he has made a *prima facie* showing that he is entitled to temporary total disability unless Eagle Marine can demonstrate the availability of suitable alternate employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

In support of its argument that TTD should terminate on December 3, 2003, Eagle Marine cites Dr. Spencer's testimony that Mr. Ivceovich could have returned to work as a marine clerk six months after his back surgery if he had not sustained the injury to his left shoulder. Mr. Ivceovich argues that he should receive TTD until June 20, 2004, because that was the date that he was finally cleared to return to work by his treating physicians.

When Mr. Ivceovich was off work, he submitted an application to transfer to the Marine Clerk's Local 63. TR 99. Local 63 clerks are guaranteed six days of work per week at key pay by their collective bargaining agreement. EX 11, at 154. In order to become a member of Local 63, he had to attend a training session for which he obtained a release from Drs. Morrison and Spencer. TR 100. He became a member of Local 63 in October or November 2003. TR 99. He was adamant that this release was only for the training and orientation – which lasted one week – and was not a general release to work as a marine clerk. TR 100. However, Dr. Spencer testified that he would have released Mr. Ivceovich to return to work at a light duty position within the physical restrictions that he had previously prescribed on December 3, 2003. CX 31, p. 91. He did not release Mr. Ivceovich to work only because he was scheduled to have the shoulder surgery with Dr. Morrison later that month. *Id.* at 93-94. In addition, he stated that a marine clerk's duties are within these restrictions, although he is concerned that it may involve too much use of his neck to look overhead. CX 31, p. 74-75.

Eagle Marine retained Captain Thomas Lombard as its vocational expert. He is a contractor for American President Lines who is writing a manual on the implementation of various longshore contract documents and gives presentations to superintendents and managers on the Pacific Marine Safety Code and state and federal OSHA regulations. EX 11 at 143-44. According to Capt. Lombard, terminals in the Los Angeles-Long Beach Harbor send their staffing requirements for marine clerks to the Pacific Maritime Association and Local 63's hiring

hall. EX 11, at 148. The available jobs are then posted at Local 63 on a board that shows how many jobs are available at each company and by category. EX 11, at 149. The captain testified that during the day shift, some clerks take whatever job is available but others try to get specific jobs at specific companies. EX 11, at 149. He stated that Local 63 members are guaranteed six hours of work at key pay by their collective bargaining agreement. EX 11, at 154. Capt. Lombard testified that in May 2004, about 500 clerking jobs were requested on Mondays and about 400 from Tuesday through Sunday. EX 11, at 153. He stated that on a daily basis over the past five years, Local 63 has been unable to fill all the positions which the terminals request with its members. EX 11, at 155. Local 63 has enough members to fill about forty-five to fifty-five percent of the positions requested, and the rest of the positions are staffed by members of the longshoremen's union or workers from the casual hall. EX 11, at 155-56.

According to Capt. Lombard, the basic hourly wage for a marine clerk is \$30.58 and all clerk's wages are based on this rate. EX 11, at 156. He explained that a 15 percent job pays 115 percent of the basic wage, plus one to two hours of overtime; a 25 percent job pays 125 percent of the basic wage, plus two to three hours of overtime; and a 30 percent job pays 130 percent of the basic wage, plus three to five hours of overtime. EX 11, at 157. The overtime hours are paid at time-and-a-half. EX 11, at 181. Further, he testified that the overtime is "a form of gratuity ... usually, it's not worked at all." EX 11, at 184. He added that two hours is "absolutely not worked ... the third hour may or may not be. ... [C]ould be as little as five minutes, as much as an hour." EX 11, at 184. He explained that only members of Local 63 get the 25 and 30 percent jobs and most members will get a 25 percent job and some will get a 15 percent job. EX 11, at 157. Capt. Lombard testified that marine clerk's have a one-hour lunch break, but gate clerks may work thirty minutes during their break and get an extra hour's pay. EX 11, at 184-85.

Capt. Lombard testified that the majority of clerk positions do not require repetitive bending of the neck or lifting of the head. EX 11, at 161-62. He testified that all the 30 percent jobs – chief supervisor, supercargo clerk, vessel planner, yard planner, and rail planner – do not involve driving a pick up truck, looking overhead, or lifting. EX 11, at 166. The tower clerk and gate clerk jobs – which are 25 percent jobs – also do not require driving a pick up truck. EX 11, at 167. The tower clerk does not violate any of these restrictions. EX 11, at 170. The gate clerks have to look to their left or right side to view people, but they generally have a swivel chair that allows them to turn their entire body instead of their necks. *Id.* at 167, 170-71. However, he acknowledged that a gate clerk would have to look up to talk to a truck driver. EX 11, at 222. He stated that yard clerk requires driving around the terminal in a pick up truck. *Id.* at 167. A double stack train (DST) clerk drives a pick up to the rail site, and the truck can be positioned at a distance that allows the clerk to read the numbers on the containers without having to look up. *Id.* at 167-68, 172. He claimed that a DST clerk enters about ten numbers per hour and can get out of the truck when he's not entering data and "stand up, do anything he wants." EX 11, at 206-07, 215. In fact, he claimed that a DST clerk spends more time not entering numbers than entering them. EX 11, at 215. He testified that the floor runner position is a 15 percent job at some terminals and a 25 percent job at others, and it requires being in a truck and looking from side-to-side to read numbers on the containers. EX 11, at 168. A chief truck delivery clerk is 15 percent job that requires the use of wire cutters to break a seal or a lock. EX 11, at 168. A pick up truck is used for this position to get to the location in the yard where the job is performed, and the seals are about five and a half feet off the ground. EX 11, at

173. This position requires moving one's head from side to side and looking at a computer screen. EX 11, at 207-09. A hatch clerk is either a basic job or a 15 percent job and drives a truck to the ship and can avoid looking up by positioning the truck far enough away from the ship to avoid having to look overhead to read the container numbers. EX 11, at 169. This position entails reading the numbers of all the containers that are loaded or unloaded. EX 11, at 210. Capt. Lombard testified that none of the marine clerk positions would violate Dr. Morrison's restriction against driving vehicles without power steering because all the trucks used by marine clerks have power steering. EX 11, at 175-76. Capt. Lombard explained that the positions that require use of a pick up to get to the work site only require the clerk to drive a maximum of 2,000 feet "to go to their spot; stay there, and then come back home for lunch, go back after lunch, and then go home." EX 11, at 184.

Capt. Lombard acknowledged that, for the most part, his knowledge of the physical requirements of marine clerk positions is based on his observations at American President Lines (APL). EX 11, at 186. He also acknowledged that his statement that all pick ups have power steering is limited to APL. EX 11, at 188. He estimated that a tower clerk would be sitting at a computer about seven hours per day, but a clerk processes information "as it comes in." EX 11, at 199-200. He also stated that a tower clerk is at liberty to stand up to stretch during the course of the day. EX 11, at 214. He claimed that a gate clerk can be at a computer terminal seven hours per day, but "he can stand up, in between trucks, between the time one truck leaves and the next truck goes in." EX 11, at 201. Further, he stated that most gate clerks stand up to speak to the truck drivers. EX 11, at 214. He also acknowledged that at some terminals, a gate clerk would have to look up because of where the computer screens are positioned, and this would be required for most of the day. EX 11, at 201-02. However, he stated that at some terminals the numbers are read automatically, and this is becoming more common on the waterfront. EX 11, at 202. He acknowledged that he does not have actual knowledge regarding the chairs provided to marine clerks at every terminal in the Long Beach area, but he noted that California's Occupational Health and Safety Administration requires suitable ergonomics. EX 11, at 202.

Mr. Ivicovich testified that two weeks before he was released to return to work, he met with the secretary for Local 63, Peter Payton. TR 103. In addition to the restrictions imposed by Drs. Spencer and Morrison, Mr. Ivicovich told Mr. Payton that he needed to be able to stand when needed and was having trouble driving, sitting for any length of time, and turning his head. TR 103. He testified that Mr. Payton gave him a list of companies with jobs that may have matched Mr. Ivicovich's limitations. TR 103. However, Mr. Ivicovich claimed that "there's no way to know what each job entails." TR 103. He explained that other members of his local get to choose their jobs before him because they have seniority. TR 104. He testified that he is not allowed to take shifts as a supercargo clerk or vessel planner because he is a new member and he lacks the training to perform those positions. TR 104.

Mr. Ivicovich testified that he now works about three to five days per week as a clerk, but he used to work six to seven days per week when he was a sweeper. TR 115. He explained that he now works fewer days because some of the clerk positions cause him too much pain during and after work. TR 115. He has worked as a DST clerk, but he has had difficulty with sitting in the truck for long periods of time. TR 110. Further, he claims that some of the trucks are in such poor condition that they lurch forward when they are put into gear, and this causes problems for

his back. TR 110. He testified that he has also performed a floor runner job, which caused fewer problems because he could stand for most of the day. TR 111. However, the floor runner job presented a problem in that he had to constantly move his head back and forth. TR 111-12. He testified that the tower jobs are bearable and he can do them, but sitting for most of the day causes him pain. TR 112. He testified that the amount of pain he experiences when performing the gate clerk job varies greatly depending upon how early he is able to get a ticket. TR 113. He explained that the clerks who have seniority get to work in booths with better equipment. TR 114. He claims that he usually gets assigned to a booth with shoddy equipment and he has to walk outside to read the chassis and container numbers before registering the information in a computer and giving a ticket to the driver. TR 114.

Insofar as the left shoulder is concerned, Dr. Morrison restricted Mr. Ivceovich to driving vehicles with power steering. TR 101, CX 26, at 981. On October 16, 2003, he reported that modified duty as a clerk “would be an ideal situation.” CX 21, at 747. Dr. Spencer recommended that Mr. Ivceovich be able to stand at will and restricted him from driving a truck, performing overhead work, and lifting more than 20 pounds. CX 28, at 983, CX 31, p. 64. He testified that a job that involved typing would be appropriate if Mr. Ivceovich could get up and move around, but he should not remain seated for eight hours straight. CX 31, pp. 64-65. When questioned further, he estimated that Mr. Ivceovich could spend five to six hours per day working at a computer, and he could remain seated for about one hour at a time. CX 31, p. 65. Moreover, he testified that repetitive head turning could cause problems for Mr. Ivceovich. CX 31, p. 95. In fact, Mr. Ivceovich testified that the tower and gate clerk jobs are “at [his] limit.”

I find that the only marine clerk position that would violate Mr. Ivceovich’s physical limitations is the yard clerk position. I note Dr. Spencer’s concerns that Mr. Ivceovich may have to use his neck to look up and from to side-to-side. However, the sub rosa films show that Mr. Ivceovich had no difficulty moving his head from to side or hunching over and craning his neck while using his camera in January 2003 and May 2004. EX 13. Indeed, the angle of his neck when using the camera appeared very similar to the kind of overhead use that most concerned Dr. Spencer. Mr. Ivceovich took pictures for about two hours on January 8, 2003 and repeatedly bent his neck for intervals of about fifteen seconds. EX 13. On May 23, 2004, he engaged in similar activity at a park near his house and once hunched over his camera for about forty-five seconds. *Id.* Most importantly, Dr. Spencer relies on Mr. Ivceovich’s subjective reports of pain in his neck when he makes a diagnoses, and Dr. Spencer testified that he did not look at the sub rosa films. CX 31, pp. 78-79. I also note that Mr. Ivceovich testified that the gate clerk position was sometimes problematic because he had to walk outside the gate, but this claim contradicts his testimony that he has fewer problems when he can stand and move around. TR 112. Moreover, Mr. Ivceovich testified that he loves being outdoors, and he does not like air conditioning because “[i]t makes me feel ill.” TR 234-35. In light of this statement, I find his complaints about the tower clerk position overstated. Dr. Spencer would restrict him to six hours of seated activity per day, and Capt. Lombard testified that most shifts are eight hours with a one hour lunch break, and the opportunity to stand as needed. Accordingly, I find that he is capable of performing positions at a computer. In addition, I find that he would be able to perform the positions that would require him to occasionally look overhead and side-to-side because his testimony regarding his neck condition was not credible and contradicted by the sub rosa films. The only clerk job he would be unable to perform is the yard clerk position. However,

appropriate clerk positions would be available to him six days per week and even seven days per week as stated by Capt. Lombard. On balance, I find that Mr. Ivceovich could have worked as a marine clerk as of December 3, 2003 and this employment was available to him. He was only precluded from working by his left shoulder injury, which was not work-related. Accordingly, he is entitled to TTD from September 27, 2002 through December 2, 2003.

III. PERMANENT PARTIAL DISABILITY

The Act defines “disability” as, “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” 33 U.S.C. § 902(10). Physical disability becomes permanent in nature when the claimant reaches maximum medical improvement, which is synonymous with the medical term “permanent and stationary.” *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233, 235 (1988); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). The point in time at which an injured worker has achieved maximum medical improvement is primarily a question of fact to be based upon the medical evidence. *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). In considering medical evidence, the Ninth Circuit has held that a treating physician’s opinion is to be accorded “special weight.” *Amos*, 153 F.3d 1051. A finding of temporary disability is inappropriate when it is based on a prognosis that a claimant’s position may improve with proper medical care and become stationary at some future time. *Dixon v. John J. McMullen & Assoc.*, 19 BRBS 243, 245 (1986)(citing *Meeke v. I.S.O. Personnel Support Dept.*, 10 BRBS 670, 675 (1979)). Likewise, a claimant’s disability will be considered permanent if his impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120, 122-23 (1988) (citing *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969)).

Mr. Ivceovich contends that his disability is not permanent because his treating physicians have not pronounced him permanent and stationary. Therefore, he submits that any determination of permanent partial disability is premature. Eagle Marine argues that a permanent and stationary date is immaterial to this litigation because Mr. Ivceovich has been cleared to work as a marine clerk. Nevertheless, it cites Dr. Spencer’s testimony that he usually declares a patient permanent and stationary about one year after he performs surgery similar to Mr. Ivceovich’s. CX 31, p. 80. Dr. Spencer testified that Mr. Ivceovich will need surgery for the degenerative condition in his neck at some time in the future if he is unable to perform activities that are integral to his work as a marine clerk: repetitive neck motion and prolonged sitting. CX 31, pp. 45-46; CX 21, at 740. However, Dr. Spencer also said that Mr. Ivceovich’s symptoms will dictate the need for surgery, and “the symptoms are what he reports to me.” CX 31, pp. 78-79. The sub rosa films – which Dr. Spencer acknowledged that he had not seen – indicate that Mr. Ivceovich was repeatedly bending his neck to take photographs as of May 23, 2004. EX 13. On balance, I find that Mr. Ivceovich’s activities in his leisure time cast some doubt on Dr. Spencer’s opinion that his neck may need surgery. Moreover, Dr. Spencer’s reports indicated that the spinal fusion was solid and Mr. Ivceovich’s strength was improving as a result of physical therapy. CX 21, at 736, 744, 749, 750. Although Dr. Spencer believes that Mr. Ivceovich *may* require surgery on his neck, he did not offer an opinion as to whether this surgery would improve Mr. Ivceovich’s condition. On balance, it appears that any improvement to Mr.

Ivicevich's spinal condition that may result from surgery on his neck is speculative. Accordingly, I credit Dr. Spencer's testimony that generally a surgery patient is permanent and stationary a year after the surgery, and find that he reached maximum medical improvement in relation to his back as of May 30, 2004.

An injured claimant is entitled to partial disability when he is employed in a job different to his usual and customary employment and sustains a loss of wage earning capacity. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 516 (4th Cir. 2000). Pursuant to § 8(e) of the Act, a claimant is entitled to two-thirds of the difference between his pre-injury average weekly wage and his post-injury wage earning capacity. A claimant's post-injury wage earning capacity is equal to his actual earnings if they fairly and reasonably represent his wage-earning capacity. *Grage v. Martinac Shipbuilding*, 21 BRBS 66 (1988). If they do not, or if the claimant has no actual wages, then the administrative law judge may fix a reasonable wage-earning capacity based on factors such as the claimant's age, physical condition, education, industrial history, and the number of hours or weeks actually worked per week or year. *Abbott v. Louisiana Ins. Guaranty Assn.*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122 (5th Cir. 1994); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 796 (D.C. Cir. 1984). The party that contends that the actual earnings are not representative of the claimant's wage earning capacity has the burden of establishing a reasonable alternative wage earning capacity. *Grage, supra*, at (citing *Burch v. Superior Oil Co.*, 15 BRBS 423 (1983)).

None of the medical experts in this matter offered an opinion as to how many days per week Mr. Ivicevich should work. Mr. Ivicevich contends that his assertion that he can work three to five days per week is consistent with the opinions of his treating physicians, but he does not explain how this is so. Eagle Marine contends that the physicians did not limit the amount that Mr. Ivicevich can work, and therefore he can work six or seven days per week. Notably, the physicians did not limit Mr. Ivicevich to part-time employment, and I would expect them to explicitly include such a restriction if it were deemed necessary. Indeed, on September 12, 2002, Dr. Spencer noted that Mr. Ivicevich could continue working as a sweeper "but we may have to modify the hours that he is working." CX 21, at 777. Accordingly, I find that Mr. Ivicevich can work five days per week.

Mr. Ivicevich argues that his actual wages are a fair and reasonable representation of his post-injury wage earning capacity. Eagle Marine submits that Mr. Ivicevich's wage earning capacity should be based on the testimony of Capt. Lombard or fixed by multiplying Mr. Ivicevich's average daily earnings by the number of days he is able to work per week. Finally, Eagle Marine submits that Mr. Ivicevich's post-injury wages can be used, but it interprets these wages differently than Mr. Ivicevich.

Mr. Ivicevich has submitted his first three paystubs from Local 63 that document his earnings from the time he returned to work until this matter went to trial. CX 33. These paystubs show that he worked twelve days during a three-week period and earned \$5,560.68. CX 33. This would yield a wage earning capacity of \$1,853.56 per week. However, his first day of work was Monday, June 21, 2004 and he avers that Local 63's pay period for that week began on Saturday, June 19, 2004. Claimant's Supp. Brief, p. 9. In addition, the harbor was not open on July 5, 2004 because of Harry Bridges's Birthday. TR 194. When viewed on a weekly basis,

the actual wages are not a fair and reasonable representation of his earning capacity because he was precluded from working three days during this three week period because of doctors' orders and an industry-wide holiday. Indeed, he worked five days during the only week in which there was not a holiday and he was not subject to doctors' orders. Eagle Marine submits that Capt. Lombard testified that the average marine clerk earns \$150,000 per year, but he acknowledged that this is an average and some clerks earn more and others earn less. Therefore, I find that this figure is not an accurate representation of Mr. Ivceovich's wage earning capacity – especially in light of the fact that he works five days per week. Next, Eagle Marine submits that Mr. Ivceovich earned his wages over eighteen possible workdays and his wage earning capacity is \$2,162.48 (\$5,560.68 divided by 18 days and multiplied by seven days). I find that this figure fairly and reasonably represents Mr. Ivceovich's wage earning capacity in that it takes into account the number of hours actually worked during this period on account of Mr. Ivceovich's physical condition. Accordingly, his compensation rate is \$361.68 per week.²

IV. MEDICAL BENEFITS

Section 7(a) of the Act requires an employer to pay for all reasonable and necessary medical expenses arising from a workplace injury. 33 U.S.C § 907(a); *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86, 94 (1989). The test is whether the expenses and treatment are recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). In considering medical evidence, the Ninth Circuit has held that a treating physician's opinion is to be accorded "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998). That is, "when the patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny." *Id.* (citing 1 Larson's Worker's Compensation Law § 13.22(e) (1998)).

Dr. Spencer testified that the back surgery was reasonable and necessary for Mr. Ivceovich because he believed that it would alleviate some of his symptoms. CX 31, p. 57. I find that the medical care and expenses that Mr. Ivceovich has incurred for his work-related cumulative trauma injuries to his neck and back are reasonable and necessary. Accordingly, Eagle Marine is hereby ordered to pay outstanding expenses related to these injuries and reimburse Mr. Ivceovich's union for expenses that it paid for these injuries. Because the left shoulder injury was not work-related, Eagle Marine is not liable for medical benefits related to this injury.

V. SPECIAL FUND RELIEF

Finally, Eagle Marine moves for Special Fund relief pursuant to § 8(f) of the Act. An employer is eligible for Special Fund Relief if it can prove: (1) that the claimant had an existing permanent partial disability prior to the employment injury; (2) that the disability was manifest to the employer prior to the employment injury; and (3) that the current disability is not due solely to the most recent injury. *Transbay Container Terminal v. U.S. Dept. of Labor*, 141 F.3d 907, 910 (9th Cir. 1998). An employer is imputed to have knowledge of a claimant's medical condition when it is "readily discoverable from the employee's medical record in the possession

² \$2,705.00 minus \$2,162.48 equals \$542.52. Two-thirds of \$542.52 is \$361.68.

of the employer.” *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 1111 (9th Cir. 1991). A claimant’s condition is considered “manifest” when his medical records contain “sufficient unambiguous, objective, and obvious indication of a disability ... reflected by the factual information contained in the available records.” *Id.*, (quoting *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 1224 (5th Cir. 1989)).

Eagle Marine cites numerous medical records and the opinions of Dr. London and Dr. Spencer to support its argument that Mr. Ivicovich’s pre-existing permanent partial disability was manifest. Dr. London testified that in 1990, he had reviewed tomograms of Mr. Ivicovich’s spine from 1976 that revealed spondylosis at L2-L3 with arthritis. TR 132. In 1999, an MRI revealed “degenerative changes about the cervical spine.” CX 21, 614-15. On June 28, 1999, Dr. Spencer noted that Mr. Ivicovich had a herniated disc. CX 21, at 854. In September 2000, he took X-rays of Mr. Ivicovich that revealed lytic spondylolisthesis and degenerative changes. CX 31, at 21-23. On balance, I find that that Mr. Ivicovich’s pre-existing degenerative back condition was manifest to Eagle Marine before this claim arose. Further, Dr. Spencer testified that Mr. Ivicovich had degeneration in his lumbar spine prior to working for Eagle Marine and his work activities accelerated his pre-existing condition. CX 31, p. 36, 39, 50-51. Accordingly, I find that Mr. Ivicovich’s permanent partial disability is not due solely to his cumulative trauma injury, and Eagle Marine is entitled to Special Fund Relief.

ORDER

1. Eagle Marine shall pay to Claimant Michael Ivicovich temporary total disability from September 27, 2002 through December 2, 2003, calculated on an average weekly wage of \$2,705.00, as compensation for the cumulative trauma injuries to his back and neck, with credit given for the payments made from September 27, 2002 through March 14, 2003, plus interest on accrued unpaid amounts due;
2. Eagle Marine shall pay Mr. Ivicovich temporary partial disability from December 3, 2003 to May 30, 2004, at the rate of \$361.68 per week as compensation for the cumulative trauma injuries to his back and neck, plus interest on accrued unpaid amounts due;
3. Eagle Marine shall pay Mr. Ivicovich permanent partial disability from May 31, 2004 at the rate of \$361.68 per week as compensation for the cumulative trauma injuries to his back and neck, plus interest on accrued unpaid amounts due;
4. Eagle Marine is entitled to relief pursuant to § 8(f) of the Act, commencing 104 weeks after May 31, 2004;
5. Pursuant to § 7 of the Act, Eagle Marine shall pay any outstanding medical expenses arising out of Mr. Ivicovich’s cumulative trauma injuries to his back and neck and right scapula, and reimburse Mr. Ivicovich’s healthcare provider, the ILWU-PMA Welfare Plan, for expenses that it has paid for these injuries;

6. Pursuant to § 7 of the Act, Eagle Marine shall provide Mr. Ivcevich with reasonable future medical care related to his cumulative trauma injuries to his back and neck and his right scapula injury;
7. The District Director shall make all calculations necessary to carry out this Order; and
8. Claimant's counsel may file and serve a fee and cost petition in compliance with 20 C.F.R. §702.132 within twenty days after the filing of this Order. He shall thereupon discuss the petition with opposing counsel with a view to reaching an agreement on fees and costs. No later than fifteen days after the filing of the fee petition, Claimant's counsel shall file written notice of what, if any, agreements have been reached. Within fifteen days thereafter, Employer's counsel shall file detailed objections to any unresolved items. Claimant's counsel may reply to the objections within fifteen days.

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ALEXANDER KARST
Administrative Law Judge

AK:jb